Filed 9/25/12 P. v. Bonilla CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIO CESAR BONILLA,

Defendant and Appellant.

F062175

(Super. Ct. No. CRM005368)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge.

Audrey R. Chavez, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna, Rachelle Newcomb, and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Julio Cesar Bonilla stands convicted, following a jury trial, of first degree murder of William Cisneros, during the commission of which defendant personally used a knife (Pen. Code,[1] §§ 187, subd. (a), 12022, subd. (b); count 1); second degree murder of Maria Clara Cisneros, during the commission of which defendant personally used a knife (§§ 187, subd. (a), 12022, subd. (b); count 2); unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a); count 3); and grand theft of a firearm (§ 487, subd. (d)(2); count 4).[2] Defendant was sentenced to a total of four years plus 40 years to life in prison, and ordered to pay victim restitution and various fees, fines, and assessments. On appeal, he claims his statement to detectives should have been excluded, and instructional errors occurred. We affirm.

FACTS

I

PROSECUTION EVIDENCE

As of September 2009, William Cisneros, who was born in 1928, had resided in the 400 block of Mission Avenue, in rural Merced, for years.[3] He lived there with his wife, Emily, until her death in 1988. In 1992, William married Clara, who was born in 1964.

During the marriage, Clara made trips to Mexico. In 2006, defendant, who was born in 1955, was with her when she returned from one of these trips. Clara introduced him to Petra Alves, William's sister, as her cousin. Although Clara and defendant's

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1 All statutory references are to the Penal Code unless otherwise stated.

2 A fifth count, charging grand theft of property (§ 487, subd. (a)), was dismissed.

3 References to dates in the statement of facts are to dates in 2009, unless otherwise specified.

For the sake of clarity, we refer to various persons by their first names. No disrespect is intended. Since the record shows Maria Clara Cisneros went by "Clara" and was referred to as such by various witnesses, we also so refer to her.

behavior toward each other made Alves suspicious of the true nature of their relationship, Alves never mentioned it to William, as she did not want to hurt him.

Defendant lived with William and Clara until their deaths. William had retired from being the gardener at Merced High School, but had continued to run his own landscaping/gardening business. Defendant and Clara helped with the business, especially in the later years, when William developed diabetes and a heart problem and could not "move around too much."

During September, the Cisneros residence was on Melissa Franks's mail delivery route. She passed the address twice a day; the gates to the property were never closed. One Thursday or Friday, she delivered a package to the house and someone came out and helped her with it. When Franks returned the following Monday, however, the gates were closed. Mail started piling up, along with UPS notices on the gates. This went on for almost two weeks, during which time Franks noticed the Cisneros's dogs getting skinnier. Eventually, she contacted animal control.

On September 30, Merced County Sheriff's Deputy Lara responded to the residence in response to a call from animal control officers on the scene. Upon his arrival, he observed malnourished dogs inside the fence surrounding the house, and a large mailbox nearly full of mail. An animal control officer cut the lock from the gate and collected the five dogs. Lara unsuccessfully tried to make verbal contact with anyone inside the house, then entered through the unlocked front door. A large living room chair was on its side, and all three bedrooms appeared to have been ransacked or rummaged through. In the bathroom were numerous dead flies.

Beyond the bathroom, in a room with a water heater, were two decomposing bodies, one on top of the other in a T-shape. One, subsequently identified as Clara, was on her back with her feet closest to the door and her arms out to the sides. She was covered with a blanket and towel. The other, subsequently identified as William, was lying with his head on top of Clara's lower torso and his feet opposite his head. He was

not covered. A pair of jeans, containing a wallet with William's driver's license and credit cards, was nearby.

The bodies were in an advanced state of decomposition and were largely mummified. They appeared to have been deliberately placed in the perpendicular position in which they were found: Clara was lying too straight, plus she was covered, while William would not have ended up as he did had he tripped over her body. Subsequent autopsies revealed Clara had three defined stab wounds: a gaping wound on the left front side of the base of the neck, and two wounds to the right back. William had three stab wounds to the chest, all in the area of the heart, lungs, and great vessels, and a stab wound to the back, between the shoulder blades.[4] Both deaths were caused by multiple stab wounds and were classified as homicides.

Detectives responded to the scene and searched the house. There appeared to be possible blood only in the room in which the bodies were found and some tracks in the kitchen area next to that room. A shotgun and pellet gun or .22 remained in the gun case. A television appeared to be missing from the living room, although other electronic devices remained there and in the office/computer room. There was a small amount of cash in William's wallet, and Clara was wearing jewelry. A blood-sugar meter was found on a table in the living room. The data it stored showed it was last used at 8:33 a.m. on August 29. That was the only data entry for that day, although for each previous day that week there were three entries. A calendar in one of the bedrooms was turned to August.

The mailbox contained mail postmarked August 26 through September 25. Among the mail was a notice of stored vehicle from the Ontario, California, Police Department. It was postmarked September 9. Detectives learned the Jeep Cherokee

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[4] In both cases, the extensive decomposition made it impossible to determine if there were additional stab wounds.

registered to William and Clara had been towed by the Ontario Police Department on the morning of September 8.

Bank records showed a savings account in Clara's name. The last transaction was a telephonic transfer, on August 25, of $3,500 from that account to defendant and Clara's joint account. Transactions occurred in the joint account in the Merced area on August 26, and in Southern California between September 2 and September 9.

Mail and medication bearing defendant's name were found in the house. A contact number for defendant was obtained from the pharmacy listed on defendant's medication bottles. The number turned out to be for a cell phone for which Clara was the subscriber. Calls were made on the phone after August 29 to an apartment in Victorville, California.

Defendant's niece, Kenya Sierra, and her husband, Jose, lived at the apartment in Victorville. One Saturday in August, defendant telephoned. He was on his way, but he did not know where he was. Defendant had not visited since 2000, and had not been in contact since 2002. Two days later, on August 31, the Sierras and defendant's sister and brother-in-law, Lidia and John Garcia, picked defendant up in Ontario. Defendant said he was sick and could not drive anymore, and the car was not working properly. His car, a Jeep, was on the side of the road on one of the freeway exits. Defendant looked pale and thin, and seemed rundown or sick. He also seemed sad, and said he had gone five years without seeing the family.[5]

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[5] Lidia had last seen defendant in January 2005, in Veracruz, Mexico. At the time, he had three houses and a restaurant business, and he also rented out rooms. Defendant disappeared in April 2005. In May 2005, he and the mother of his four boys would have been together 25 years. They were going to get married. Between 2005 and when Lidia saw him in Ontario, she had no knowledge of his whereabouts, despite her efforts in looking for him.

Defendant told Jose he had met a woman in Veracruz and married her in Guadalajara. She told defendant to come to America because she was going to sell some properties for about $3 million and give him half. When Lidia asked where he had been, he said he was lost, kidnapped, and did not know where he was. He looked disturbed. Defendant told Kenya he had been near the Sacramento area, and when he went there to live with the lady, to his surprise he found someone else at the home. They told this man that defendant was the lady's cousin. Defendant said it was like he had been kidnapped, as he did not have his freedom all the years. Defendant said the woman would not let him out or allow him to use the phone, and she kept him as a sex slave. The lady made him go to bed early, and gave him, and the other man, a pill every night. Defendant told Kenya he had tried to escape on an earlier occasion, but the lady had caught up to him in her car and said that if he did it again she would kill him. When Kenya asked how he got away this time, defendant said he had to hit the lady in order to escape. Defendant said the old man had not been there, he had "stepped out."

Defendant stayed in Victorville for about two weeks. Lidia contacted her sister in Louisiana to tell her defendant had reappeared. The sister said to send him there and she would get him work. Kenya and Lidia gave defendant money to make the trip.

Detectives eventually recovered two televisions, the serial numbers of which matched the serial numbers on two boxes found at the Mission Avenue residence; a rifle William's brother said looked like one belonging to William; an ATM card in defendant's name that was to his joint account with Clara; and several other items from the Sierras' residence. From the Garcias' residence, they recovered two suitcases containing several cell phones (at least one of which contained photographs taken at the Mission Avenue address); a camcorder with videotapes of Clara, William, and defendant; and other items. They also obtained a baptism record, a birth certificate, and some miscellaneous papers belonging to William; a marriage certificate for William and Clara; two passports in Clara's name; check registers for William and Clara, and check registers

for the joint accounts of Clara and defendant; a Mexican marriage certificate for defendant and Clara, dated December 9, 2006; and some other documents in defendant's name.

An arrest warrant was obtained for defendant, who was contacted in jail in a suburb of New Orleans, Louisiana, on October 23. Defendant was brought back to Merced, where he was interviewed in Spanish by Detective Barba. Detective Hale was present at the interview.[6]

In the interview, defendant related he was doing well and working in Mexico when he met Clara in Guadalajara in 2005. Defendant was with, although not married to, the mother of his four sons. Nevertheless, Clara "stuck to [him] like gum." He and Clara were lovers for about two months, and then he went to Chihuahua. Clara followed him to Chihuahua. He moved on to Tabasco and then on to Veracruz. Clara continued to follow him. Clara wanted him to come to the United States to work. He refused, because he was making good money where he was. Little by little, however, she became more involved with him.

Clara would telephone the United States and talk to someone in English. She would tell defendant, who did not speak the language, that she was talking to her boss. When she was with defendant in Guadalajara, and said they should come to the United States, she also suggested they get married. She wanted to get married through the church. Defendant did not know she was already married.

In 2006, defendant stayed in Guadalajara and Clara returned to the United States. When she came back to defendant a month later, she had good money. Each day, she

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6 An audio-video recording of the interview was played for the jury, which also had a transcript of the Spanish interview together with the English translation. Both have been transmitted to, and reviewed by, us.

In quoting from the transcript, we include only English translation (omitting the parenthesis in which it was enclosed in the transcript) and statements spoken in English.

took money out of the bank. She spent about $30,000 on the wedding. Defendant did not spend anything. Although he would tell her he did not want to be with her because of his sons, she insisted on winning him over. She bought him a car and other things. When they got married, she was sweet. He did not have papers to come to the United States, so she brought him "as a wetback."

Once they got to the United States, she changed things. She did not let him talk to or see his sons. She put him in a cheap hotel for about a week, then said she was going to take him to her ex-husband's house. Clara said she would take care of her ex-husband because he was very sick and that she and defendant could live there and help her ex-husband with his job doing yard work. She then took defendant to the house and locked him in there, and she introduced him as her cousin. Defendant did not know Merced and had never worked doing yard work; he was a salesman. But Clara would get him up at 6:00 in the morning "to go do the yards." Little by little, she "started molding [him]." He could not watch television or listen to the radio or even go outside when they were not working on the yards. He would go with Clara and William to take care of the few yards William had, and they would be back at the house by 8:30 a.m. Clara put up curtains, and it was "like a monastery," with no noise at all. Eventually, they did not go out to work anymore because William could not, so then defendant was just locked in the bedroom. He was unable to go outside because of the dogs, which were mean, and which Clara would not let him near so they would not get to know him. Clara would give him a cup of tea, and he would "go to sleep like a rock." Defendant was desperate, thinking of his sons, and wanted to kill himself.

Asked how he got away from the house, defendant related that when he saw "all of that chaos," he went outside and started to leave. Since he did not know where to go, he came back and then left again, taking William's truck. Instead of going south, however, he discovered he was going north. In Atwater, he made a turn. He "was already crazy."

He saw blood near the kitchen, and Clara and William dead. He thought it was on a Saturday. He was in the bedroom and did not hear anything.

When detectives told defendant that they had obtained information from some of his family members, that they knew defendant killed William and Clara, and that there was a difference between killing someone "for no reason" and defending oneself, defendant said he felt he was kidnapped, because he "didn't have any say so for anything." He said he wanted to leave, but did not know how.

Defendant related that, on the Saturday in question, William arrived about 8:00 a.m. with food that he always brought on Saturdays. William and Clara started arguing. William had a knife. William and Clara came towards him. Defendant tried to stop their fighting so he could leave. They told defendant to go back into the bedroom. William stabbed Clara. William went toward defendant with the knife saying he was going to kill him. When William tried to strike at him, defendant took the knife from William and stabbed William with it. William took the knife back from defendant and defendant went outside.

When informed that William had more than one stab wound and asked how he thought that happened, defendant said he was "already crazy and maybe out of desperation, and since [defendant] was all drowsy and everything."

Defendant returned to the house 20 to 30 minutes later. William was still alive, kneeling on the kitchen floor. William had the knife in his hand, was saying "[d]ogs[, d]ogs" and that he was going to kill defendant. Clara was dead, on the floor by the washing machine, with a cloth covering her face. Defendant got nervous and said, "'Well, he's going to kill me.'" That was when defendant said he "made the mistake." Defendant used William's knife to stab William again. He did not know how many times he stabbed William. William tripped over Clara's feet and fell on top of her. Defendant cleaned up William's blood.

Defendant left, taking some clothes with him, as well as two televisions that he thought he could sell when he needed gas. He also took a rifle and jewelry, but only his jewelry that he had brought from Mexico. He grabbed the paperwork with William's birth certificate and the other things because he thought his papers were in there. He did not even look at what all he was taking.

Defendant related that his sons had looked for him, but when they could not find him, everyone thought he was dead. He was locked in and begged Clara to allow the two of them to go to church or to a psychiatrist so Clara could be helped and could let him go. If he had had anything with which to kill himself, he would have done so. He would plead with William to help him get out of there, but William would just laugh. Asked whether Clara forced him to have sex with her, defendant maintained his penis did not get hard anymore because he was always sleeping. Sometimes Clara would tie him up and masturbate on his leg, but since he was asleep, it did not bother him.

II

DEFENSE EVIDENCE

Defendant, who was 55 years old at the time of trial, testified that he spent the first 50 years of his life in Mexico, where he sold clothing and imported merchandise, and also had a restaurant/bar. When he left Mexico at age 50, his four children ranged in age from 13 to 28.

Defendant's job involved buying clothing and merchandise in bulk and selling it in different cities. As a result, he traveled all over Mexico. He met Clara when he stayed at a friend's apartment in Guadalajara. Clara's sisters lived next door. The relationship progressed from flirting to dating to falling in love.

Defendant went to Veracruz to see his children. While he was there, Clara arrived unexpectedly. They traveled back to Guadalajara; from there, he went to Chihuahua to get some merchandise. She arrived the following day. They became inseparable. Eventually, they were married in a church. Defendant was happy.

Several months after the wedding, defendant came to the United States with Clara because she "required" it of him. They went directly from Tijuana to some hotel chosen by Clara. She was supposed to find defendant a job. They stayed there about a week, then Clara said they were going to go live with her ex-husband. One night, William came with her to the hotel. Clara introduced the two men, telling William, "this is Julio, the one I talked to you about." They then took defendant to the house, where Clara introduced defendant to William's sister as Clara's cousin. This surprised defendant.

At the house, William slept in the large bedroom, while defendant was assigned the bedroom next to it. Defendant thought Clara would sleep with him, but she said she had to take care of William, and that she and defendant would talk the next day. To defendant, this was "like a slap to the face," although he learned Clara and William slept on opposite sides of a big pillow that was on their bed. The next morning, defendant asked Clara what was going on. She did not explain her relationship with William, but merely said William would give defendant work because he could no longer "do the job, the yards."[7] William would show defendant how to work the machines, she and defendant would take care of William, and defendant would go out and "do the yards." Defendant thought this arrangement was acceptable for the time being, as he had a job and food. As a result, he took over the business, but William remained the boss.

Defendant came to like William, who was "very noble" and a good person. Within the first week he was in Merced, however, he learned Clara and William were still married. When he asked Clara where this was going to end up after so much suffering on defendant's part, Clara told him to wait, that William was older, defendant should look on it as a job, and it would be her and defendant's future. As a result, defendant stayed. In addition to working in the landscaping business, he did the housework, made the meals, gardened, and turned the dirt in the field. He was also in charge of giving William

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[7] William had 32 houses for which he did landscaping and mowed lawns.

his medication. William took nine prescribed pills and insulin injections, which defendant administered. Defendant also shaved William and cut his hair, and defendant also cut and colored Clara's hair. Defendant did not tell William about defendant's relationship with Clara, as it would have hurt William. Defendant always tried not to hurt William, but he also loved Clara very much. Defendant did not contact his sons or family and tell them where he was, because Clara was very jealous. Also, neither defendant nor Clara wanted to have to explain who William was, should defendant's sons find defendant. Clara would tell defendant that when William died, everything would be hers and then she and defendant could go to Guadalajara and live.

Despite William's presence, defendant and Clara were able to spend time as man and wife. William would walk down to the store, and defendant and Clara would be alone. That was their "happy time," and they took pleasure in sex. Clara and defendant never went on vacation together alone, but the two of them and William traveled various places such as Lake Tahoe. The three of them also ate meals together and celebrated holidays together as well.

There was a gun rack in defendant's bedroom with a shotgun and one or two rifles. William gave the guns to defendant, saying he (William) was not going to hunt anymore. Defendant loved William as a father figure and believed William came to like defendant as a son. They got along very well. Defendant, William, and Clara were always together, "like the three musketeers." It was always only the three of them together. Defendant "felt good." They were living in peace up until the incident happened.

The day before the incident, the three went to Monterey. They returned home early on Saturday morning. Defendant went to sleep in his bedroom, while William and Clara slept in theirs. Defendant usually arose around 7:00 a.m. on Saturdays, but this day, Clara woke him around 9:00 a.m. William had already left to buy food, something he did every Saturday.

Clara lay down in bed with defendant. The two were always careful; the dogs would be turned loose so they would bark when William got home. Defendant and Clara would use this as an alarm, and would separate if the dogs barked. On this day, however, Clara had already put the dogs up in their pen. William yelled at Clara from the living room, where he was pricking his finger to check his blood-sugar level. Clara went running out of defendant's bedroom toward the bathroom, holding her panties. She had her clothes with her so she could dress in the bathroom. She left her bra in defendant's room, however, and defendant believed William saw her naked.

Defendant heard Clara and William yelling profanity at each other. He left his room and saw them arguing. Clara was in the kitchen, while William was in the other little room where the broiler was. Defendant took Clara's hands and said to stop fighting. She pushed him and he pushed her back with his hands. He did so because she and William were having a very heated argument. When defendant pushed her, Clara scolded him and told him to go to sleep. She told defendant she would take care of this herself.

Defendant went to his room and turned on the radio so he would not hear them fight. When he turned off the radio, he did not hear anything, so he went toward the kitchen to see if everything was calm. He saw Clara lying on the floor toward the broiler, with her feet facing the entrance of the kitchen. She was face up, and he thought she was already dead, because she was no longer moving and there was blood.

Defendant saw William with a long, thin knife that he habitually used to filet fish. William was standing almost over Clara. He said, "It's just you now, dog, that's left," and he came after defendant. Defendant pushed him and they briefly struggled in the kitchen. William tried to stab defendant with the knife. Defendant threw up an arm, then turned and went running out through the living room. As he did so, he pushed over the chair. He did not know if William was injured during this initial struggle. Defendant saw blood on the knife, but did not know if it belonged to Clara.

Defendant made it outside, but, because he was only wearing the shorts in which he slept and no shoes, he did not leave. He was crying and unable to think. Finally, he went back inside to see what had happened and at least put on some shoes. He went in through the front door, then looked in the kitchen. Clara's body was in the same place, but William had moved her feet away from the doorway and had covered her. William was with the body. He was crying, then he went after defendant again. Defendant ran, but could not get out because of Clara's body. Defendant ended up back in the broiler room, where William attacked him. Defendant had never seen William like that. William was almost like he had been possessed by the devil. He was an old man, but strong.

William tripped over Clara's feet, and defendant took the knife away from him and stabbed him, injuring him badly and killing him. It was defendant's life or William's.[8] The two bodies stayed in the broiler room; defendant did not touch or position them. Seeing the two bodies, emotions overtook defendant; he cried and did not know what to do. Then he started to take things. He was looking for his documents, which Clara had in her dresser drawer. From his room, he took the things that were his.[9] He did not know where to go. He telephoned Victorville, because he had a guitar with his niece's phone number on it. He did not call the police; although he wanted to turn himself in, he was scared.

After the car broke down and his sister, niece, and niece's husband came to pick him up, they asked where he had been, because so much time had passed. The only thing he thought to say was that he had been kidnapped. When Kenya asked how he got away,

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8 Defendant did not recall if he stabbed William in the back. He was "just out of it," "just crazy."

9 Defendant and Clara had purchased two televisions; he thought he could sell them. William had given him two shotguns; defendant took one of them. The jewelry he took was what he had brought with him from Mexico.

he did not say he had to hit the woman; rather, he had to have some excuse, so he said he just pushed her and got away.

Defendant stayed in Victorville for about two weeks. He then went to New Orleans, where he had a half sister. He was ashamed to go back to Mexico with nothing. He had lost everything. Also, he wanted to make some money so he could work again in Mexico. Defendant was in New Orleans for about a week when the police picked him up, then Detective Hale came and got him.

When defendant was interviewed in Merced, he was sick and smelly and embarrassed. He told detectives he had been kidnapped. He did not know what he was saying. He was ashamed of everything that had happened to him at his old age. He was afraid and thought he would be tortured or given lethal injection. He did feel as if he had been kidnapped, because he felt like he could not pick up the phone and call his son to say he was fine.

Defendant admitted that although he told detectives he could not watch television, sometimes he, Clara, and William watched soccer together. He also admitted what he told detectives about not being allowed to listen to the radio was untrue. Clara would give him a pill to sleep, but simply so he would not toss and turn all night. He did not think she was trying to drug him. Defendant admitted he lied to Kenya when he told her he was kept as a sex slave; although Clara was "very high maintenance," the sex was with his consent. It was his choice to stay in Merced; he stayed because he loved Clara very much.

Defendant admitted telling Kenya that William was not home when he hit Clara. In reality, he did not argue with Clara, and told Kenya that William was not home so she would no longer worry. Kenya said they should call the police and make a report, but defendant said no. He admitted hitting Clara; he "took her like this" when she and William were arguing. Clara said defendant was hurting her, so he "went like this,"

whereupon Clara stayed there, fighting with William.[10] They told defendant to go to his room, and Clara said she would take care of it.

DISCUSSION

I

MIRANDA

Defendant contends his statement to detectives was unlawfully elicited in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), after he invoked his right to counsel. Accordingly, he says, it should have been excluded in its entirety; because its wrongful admission cannot be declared harmless beyond a reasonable doubt, reversal of his convictions on counts 1, 2, and 4 is required.

A. Background

The People sought admission of defendant's October 23, 2009, statement to Detectives Barba and Hale. Defendant sought the statement's exclusion on the ground he invoked his right to counsel immediately after being read his rights and at several other points during the interrogation. An Evidence Code section 402 hearing was held to determine admissibility.

At the hearing, Detective Hale testified he transported defendant from Kenner, Louisiana, to the Merced County Sheriff's Department. Hale picked defendant up at the jail in Kenner at 4:00 or 5:00 a.m., Louisiana time. They went to the New Orleans International Airport, where Hale asked defendant if he was hungry. Defendant was sick and did not want to eat. They flew to Dallas, Texas, where they had a two-hour layover. Hale again offered to buy defendant something to eat, and defendant accepted. They subsequently flew to San Jose, California, and went by ground transport from San Jose International Airport to the investigations division at the sheriff's office. Hale estimated the total flight time as six or seven hours, plus an hour to an hour 15 or 20 minutes to

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[10] Defendant's gestures were not described for the record.

drive from San Jose to Merced. During the trip, Hale asked no questions regarding this case. He provided bathroom breaks for defendant and also offered water.

Detective Barba interviewed defendant. Barba testified that he was born in Nicaragua, lived there the first 14 years of his life, and spoke Spanish in his family home. He was aware of differences in how people spoke Spanish in Nicaragua versus Mexico, and took that into account when interpreting or translating for other officers. Hale was present during the interview, which was audio- and video-recorded.[11] Hale believed the interview occurred during the mid-afternoon to early evening, and that the timestamp on the DVD — 2:52 a.m. — was probably wrong and perhaps the result of a power outage.

The transcript of the interview shows Barba began by talking to defendant about such subjects as defendant's having been raised in Mexico, where his mother lived, and what he thought of Louisiana. Barba also informed defendant that Barba had talked to defendant's sisters and brother-in-law, and he assured defendant nothing had happened to his family.[12] This ensued:

> "[Hale:] Why don't you (unintelligible) give him your pre-opening speech about how we work and what honesty does and what we expect, and that way nothing is off guard.
>
> "[Barba:] Look, right now we only have one side of the story that they're telling us, okay? So we don't know your side of the story. This is why there was an arrest warrant for your arrest, because we don't know the

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[11] The trial court reviewed the transcript and DVD of the interview in conjunction with the Evidence Code section 402 hearing. As previously stated, we have also reviewed both.

[12] At the Evidence Code section 402 hearing, Barba explained he did not ask questions designed to get some type of incriminating response; rather, it was his tactic to have this type of conversation with everyone he interviewed. He never went into details about the case, but sought to establish a positive relationship with the person so the person would feel at ease with Barba interviewing him or her. Hale confirmed establishing a rapport with suspects was a routine police procedure taught in advanced interview and interrogation classes.

rest of the story, you understand? So if we don't know, we can't talk, you understand? So this is why we are here ah, and that's why-why we have to do the things this way, you understand?

"[Defendant:] Um.

"[Barba:] That's why you were arrested over there, he-he-he, just because you have been arrested, no…well, it doesn't mean that they found you guilty, you understand?

"[Defendant:] Because I don't know anything about what they told me over there.

"[Barba:] Okay.

"[Defendant:] What I know is that I was there...

"[Barba:] No, wait-wait...

"[Defendant:] ...I was...

"[Barba:] Wait, do you understand what I'm saying to you?

"[Defendant:] Yes.

"[Barba:] So, you said ah, that you want to talk. You were asking me questions about what happened in Victorville, and about your sister and all of that. So, we can talk about all of that too, okay? But we are going to ask you some questions, okay?

"Right now he is under arrest for homicide, right?

"[Hale:] Right.

"[Barba:] Okay, right now you are under arrest for double homicide, okay? Everyone in the United States has rights, okay? I'm going to read you your rights. [¶] You have the right to remain silent. Anything you say can be used against you in court. You have the right to have an attorney present, if you cannot afford an attorney, the County will pay for an attorney to represent you, before I ask you any questions, you understand?[**13**]

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13 Barba testified he gave the *Miranda* admonishment from a standard card. The card was in English; when Barba read it to someone like defendant who spoke only

"[Defendant:] [Then] I need an attorney[. No? S]o that...[14]

"[Barba:] And then...

"[Defendant:] ...but I don't have any money.

"[Barba:] No, that's why I'm telling you, if you don't have any money to hire an attorney, then the County will give you-give you an attorney, because over here, everyone has the right. It doesn't matter if you don't have any money, the County of Merced will give you an attorney. You are going to get an attorney if you want one. But, do you want to explain to us what happened, and everything that has happened ever since you came over here and you married that woman?[15]

"[Defendant:] No, I met that woman in Mexico.

"[Barba:] Okay. But, so do you want to talk to us, and explain to us how things happened?

"[Defendant:] No, no, nothing bad happened, what happened was...

"[Barba:] No, that's why I'm telling you.

"[Defendant:] ...All I can remember is that they had me there locked in.

"[Barba:] Okay. That's why you want to explain all of that to us so we can talk right, and we can understand each other, because right now, we don't know...

"[Defendant:] Well, yes.

"[Barba:] ...you understand? We have evidence.

"[Defendant:] Well, I didn't do anything.

Spanish, he translated it as he went along. Barba did not have any trouble understanding defendant, and defendant appeared to understand what Barba was saying to him.

14 Janet Trujillo, a certified judicial interpreter of Spanish, testified she heard the bracketed words and punctuation when listening to the recording.

15 The recording shows defendant nodding his head affirmatively as Barba explains about the county giving him an attorney.

"[Barba:] Okay-okay.

"[Defendant:] All I know is that I met her in Mexico and-and-and...

"[Barba:] Wait a minute.

"He ah, I read him his rights. He says that, 'He doesn't have any money for a lawyer.' I explained to him again that it doesn't matter whether he has money for a lawyer or he doesn't have any money then the County is gonna give him a lawyer to represent him. I'm asking him if he wants to talk to me and tell me his side of the story, and he's going into ah, and to saying that ah, 'He met the woman in Mexico and that he didn't do anything.' [A]nd I'm asking him again, 'Well, okay, do you want to tell me what happened?' So he's going into stuff.

"[Hale:] Okay. Um, just let him keep going into stuff.

"[Barba:] Okay.

"[Hale:] And if he wants to talk to us.

"[Barba:] Yeah.

"[Hale:] Just let him.

"[Barba:] Okay.

"So what happened? What can you tell me? Tell me about the woman. When did you meet her?"

Barba's reading defendant his rights and explaining about how the county would appoint a lawyer for him were shown on pages 8-9 of the transcript, which, the parties stipulated, was approximately seven and a half minutes into the recording. At the Evidence Code section 402 hearing, Barba related that defendant continued to talk to him at all times, even after Barba asked if he wanted to talk and explain how things happened. Barba took no steps to get an attorney for defendant. He did not ask defendant specifically if defendant wanted to waive his rights; that was not something Barba did. He had been trained that he could go by implied waiver. Defendant never told Barba he understood his rights, but defendant kept talking. Barba believed defendant understood.

As shown at pages 83-84 of the transcript, defendant subsequently said to Barba, "I thought you said you were going to get me an attorney. Get me an attorney, because that's all I really know. Yes it's true about him because...." Barba testified defendant then kept talking, even while Barba tried to clarify whether he really wanted an attorney. Page 119 of the transcript shows defendant saying, "Well, get me an attorney so I can get some help because I didn't...." The interview ended shortly after.

Janet Trujillo testified at the Evidence Code section 402 hearing as an expert in the field of interpreting Spanish. With respect to what she heard when listening to the DVD of the interview, the word "No," after, "Then I need an attorney," was a question. She was not sure what defendant meant by it. Making a declarative statement and then following with the question "no?" was common usage, especially in regions in Mexico including Guadalajara. It did not actually mean "no," but was more a reaffirmation, like someone might use "right" or "yeah."

The trial court excluded all of defendant's pre-*Miranda* statements, although it found no evidence of a deliberate practice to obtain incriminating statements pre-*Miranda* and then reduce them to post-*Miranda* form. The court concluded defendant's statement following the *Miranda* warnings was ambiguous rather than a clear assertion of his right to counsel. The court determined defendant's response, with "no" in the form of a question, could be taken two ways — either as a reaffirmation that yes, he needed a lawyer, or as looking for clarification from Barba. Barba attempted to clarify, but defendant continued to voluntarily respond to the questions. Accordingly, the court found an implied waiver of defendant's *Miranda* rights until his unequivocal statement at pages 83-84 of the transcript. As a result, the court ruled the interview was admissible starting with the *Miranda* rights on page 8 of the transcript, up to defendant's unequivocal request for an attorney on page 83 of the transcript.

Defendant says the court erred.[16]

B. Analysis

In reviewing defendant's claim his statement to detectives was elicited in violation of *Miranda*, we apply federal standards. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033.) Additionally, "we accept the trial court's resolution of disputed facts and inferences, and its evaluation of credibility, if supported by substantial evidence. [Citation.] Although we independently determine whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained (*ibid*.), we '"give great weight to the considered conclusions" of a lower court that has previously reviewed the same evidence.' [Citations.]" (*People v. Wash* (1993) 6 Cal.4th 215, 235-236.)

"Pursuant to *Miranda, supra*, 384 U.S. 436, 'a suspect [may] not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and, if indigent, to appointed counsel.' [Citations.]" (*People v. Dykes* (2009) 46 Cal.4th 731, 751.) "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease…. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." (*Miranda, supra,* 384 U.S. at pp. 473-474, fn. omitted.)

After being advised of his or her rights, a suspect may validly waive them and respond to questioning. (*Edwards v. Arizona* (1981) 451 U.S. 477, 484 (*Edwards*).)

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16 In presenting his claim of error on appeal, defendant includes additional circumstances surrounding the interview that were adduced at trial, such as his illness, lack of medication, inadvertently poor personal hygiene, and belief he would be tortured and given a lethal injection. When elicited at trial, these circumstances did not result in a renewed motion to suppress defendant's statement. Accordingly, while they were relevant to the jury's assessment of what defendant told detectives, they are not relevant to his claim the statement should have been excluded as violative of *Miranda*.

"'The prosecution bears the burden of demonstrating the validity of the defendant's waiver by a preponderance of the evidence.' [Citations.] In addition, '[a]lthough there is a threshold presumption against finding a waiver of *Miranda* rights [citation], ultimately the question becomes whether the *Miranda* waiver was [voluntary,] knowing[,] and intelligent under the totality of the circumstances surrounding the interrogation.' [Citation.]" (*People v. Williams* (2010) 49 Cal.4th 405, 425 (*Williams*).)

"An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." (*Miranda*, *supra*, 384 U.S. at p. 475.) "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights…. [A]n accused, … having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (*Edwards*, *supra*, 451 U.S. at pp. 484-485, fn. omitted; see also *People v. Gamache* (2010) 48 Cal.4th 347, 384.)

Both parties cite *Davis v. United States* (1994) 512 U.S. 452 (*Davis*), in which the United States Supreme Court held that, in order for the "'"rigid" prophylactic rule' of *Edwards*" to come into play, the accused must actually invoke his or her right to counsel. (*Id.* at p. 458.) Whether he or she has done so is an objective inquiry, and "'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' [Citation.] But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the

circumstances would have understood only that the suspect *might* be invoking the right to counsel," questioning need not cease. (*Id*. at p. 459.)[17]

Relying on *Davis* and its progeny, the People argue defendant's statement — "[Then] I need an attorney[. No?]" — was ambiguous or equivocal; hence, Barba and Hale were neither required to clarify whether defendant was invoking his right to counsel nor to stop questioning him. (See *Davis, supra*, 512 U.S. at pp. 461-462.) As defendant observes in his reply brief, however, *Davis* and its progeny apply to a postwaiver invocation of rights. (See, e.g., *People v. Nelson* (2012) 53 Cal.4th 367, 371-372, 376-377; *United States v. Rodriguez* (9th Cir. 2008) 518 F.3d 1072, 1079 [*Davis* addressed what suspect must do to restore *Miranda* rights after having knowingly and voluntarily waived them, not what police must obtain, in initial waiver context, to begin questioning].) "Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together." (*Smith v. Illinois* (1984) 469 U.S. 91, 98, fn. omitted; see also *People v. Martinez* (2010) 47 Cal.4th 911, 951.) In the present case, although whether defendant's statement was ambiguous or equivocal still matters, we are not concerned with whether defendant invoked his right to counsel after having waived it, but with whether he waived or invoked it in the first instance.[18]

To be valid, a waiver of the rights set out in *Miranda* warnings must be voluntary, i.e., "the product of a free and deliberate choice rather than intimidation, coercion, or deception." (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) It must also be made "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." (*Ibid*.)

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17 In *Berghuis v. Thompkins* (2010) 560 U.S. ___ [130 S.Ct. 2250, 2259-2260], the high court extended *Davis*'s rationale to invocation of the right to remain silent.

18 Our analysis in this regard applies equally to defendant's right to remain silent.

> "It is further settled, however, that a suspect who desires to waive his *Miranda* rights and submit to interrogation by law enforcement authorities need not do so with any particular words or phrases. A valid waiver need not be of predetermined form, but instead must reflect that the suspect in fact knowingly and voluntarily waived the rights delineated in the *Miranda* decision. [Citation.] [The United States and California Supreme Courts] have recognized that a valid waiver of *Miranda* rights may be express or implied. [Citations.] A suspect's expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights. [Citations.] In contrast, an unambiguous request for counsel or a refusal to talk bars further questioning. [Citation.]" (*People v. Cruz* (2008) 44 Cal.4th 636, 667-668; see also *Berghuis v. Thompkins*, *supra*, 130 S.Ct. at p. 2261.)

The United States Supreme Court has "never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights. [Citations.] Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law." (*Moran v. Burbine, supra,* 475 U.S. at pp. 422-423, fn. omitted.)

The record in the present case contains no evidence of coercion, intimidation, or deception. There is no suggestion defendant did not understand Barba's Spanish, even though they were from different countries. Defendant was told why he was under arrest. Although defendant was not American, Barba expressly told him that *everyone* in the United States has rights, and that he was going to read them to defendant. The video recording shows defendant listened intently.

Although Barba did not ask if defendant understood and wished to waive each right after reading it, in our view defendant's question about needing an attorney demonstrates his understanding of his rights, except with respect to the concept of having counsel appointed. Barba promptly undertook a more detailed explanation of defendant's

right in that regard, and the video shows defendant nodding affirmatively during this explanation. Defendant clearly was not afraid to ask questions; the fact he nodded and asked nothing else demonstrates he understood he would be given an attorney if he wanted one, even if he had no money to pay for one.

Moreover, considering context and inflection, "[Then] I need an attorney[. No?]" was a request for Barba's advice about whether defendant needed an attorney, not a request for one. Defendant disputes this, saying the inclusion of the interrogative "No?" was an indicator of politeness or deference, and that he *may* have been seeking or expecting confirmation of his *request* for counsel. Even assuming defendant is correct about Mexican culture and its effect on forms of speech (no evidence of which was presented in the Evidence Code section 402 hearing), in our view the record does not show a request for counsel.

Two recent California Supreme Court opinions are instructive. In *Williams*, *supra*, 49 Cal.4th 405, the defendant expressly waived his right to remain silent when read his *Miranda* rights. When asked if he wished to give up the right to speak to an attorney and have one present during questioning, the defendant responded, "'You talking about now?'" Asked if he wanted to have an attorney present while he talked to detectives, the defendant answered affirmatively. When one of the detectives stated, "'You don't want to talk to us right now,'" however, the defendant said yes, he would talk to them right then, without an attorney. After further clarification that a public defender would not be available until Monday (the conversation occurred on Saturday), the defendant said he did not want to wait and wanted to talk then. (*Williams*, *supra*, at pp. 425-426.)

The state Supreme Court found the record demonstrated the defendant's knowing and voluntary waiver of his right to counsel. (*Williams*, *supra*, 49 Cal.4th at p. 426.) Addressing the defendant's claim he plainly indicated his desire to consult with counsel so that questioning should have ceased immediately, the court stated:

"The question whether a suspect has waived the right to counsel with sufficient clarity prior to the commencement of interrogation is a separate inquiry from the question whether, *subsequent* to a valid waiver, he or she effectively has invoked the right to counsel. [Citations.] It is settled that in the latter circumstance, after a knowing and voluntary waiver, interrogation may proceed 'until and unless the suspect *clearly* requests an attorney.' [Citation.] Indeed, officers may, but are *not required* to, seek clarification of ambiguous responses before continuing substantive interrogation. [Citation.]

"With respect to an initial waiver, however, '[a] valid waiver need not be of predetermined *form*, but instead must reflect that the suspect in fact knowingly and voluntarily waived the rights delineated in the *Miranda* decision.' [Citations.]

"This court has recognized that 'when a suspect under interrogation makes an ambiguous statement that could be construed as an invocation of his or her *Miranda* rights, "the interrogators may *clarify* the suspect's comprehension of, and desire to invoke or waive, the *Miranda* rights."' [Citations.]

"Whereas the question whether a waiver is knowing and voluntary is directed at an evaluation of the defendant's state of mind, the question of ambiguity in an asserted invocation must include a consideration of the communicative aspect of the invocation — what would a *listener* understand to be the defendant's meaning. The high court has explained — in the context of a postwaiver invocation — that this is an objective inquiry, identifying as ambiguous or equivocal those responses that 'a reasonable officer in light of the circumstances would have understood [to signify] only that the suspect *might* be invoking the right to counsel.' [Citations.] This objective inquiry is consistent with our prior decisions rendered in the context of analyzing whether an assertion of rights at the initial admonition stage was ambiguous. [Citation.] We note that a similar objective approach has been applied by the United States Court of Appeals for the Ninth Circuit to identify ambiguity in a defendant's response to a *Miranda* admonition; a response that is reasonably open to more than one interpretation is ambiguous, and officers may seek clarification. [Citation.]

"In certain situations, words that would be plain if taken literally actually may be equivocal under an objective standard, in the sense that *in context* it would not be clear to the reasonable listener what the defendant intends. In those instances, the protective purpose of the *Miranda* rule is not impaired if the authorities are permitted to pose a limited number of

followup questions to render more apparent the true intent of the defendant." (*Williams*, *supra*, 49 Cal.4th at pp. 427-429.)

In *People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, the defendant clearly indicated he understood each of his rights as translated to him in Spanish. Asked if, having his rights in mind, the detective could speak to him right then, the defendant replied, "'If you can bring me a lawyer, that way I[,] I with who … that way I can tell you everything that I know and everything that I need to tell you and someone to represent me.'" Told the detective wanted to know if the defendant was willing to speak to him right then without a lawyer present, the defendant responded, "'Oh, okay that's fine.'" Asked again if he wanted to speak to the officer right then, the defendant said, "'Yes.'" (*Id*. at pp. 206-207.)

Relying on *Williams*, the California Supreme Court found the defendant's statement about a lawyer to be sufficiently ambiguous to justify the officer seeking further clarification of whether the defendant was attempting to invoke his right to counsel or wanted to waive his *Miranda* rights. The court further found the followup questions were not coercive and preceded any substantive interrogation, and, under the totality of the circumstances, the defendant's responses made clear he was willing to speak to the detective without an attorney present. (*People v. Sauceda-Contreras*, *supra*, 55 Cal.4th at pp. 206-207, 219-220.) The court reaffirmed that police may seek clarification when a suspect makes an ambiguous or equivocal request for counsel at the initial stage of an interrogation (*id*. at p. 217), and found that, following clarification, the defendant went on to make a voluntary and knowing waiver of his *Miranda* rights (*People v. Sauceda-Contreras*, *supra*, at p. 220).

In the present case, Barba immediately explained that defendant would be given an attorney — regardless of whether he had money — if he wanted one, then sought to clarify whether defendant wanted to talk to detectives. Each time Barba asked *if* defendant wanted to explain what happened, defendant did not answer the question

asked, but rather started to explain what happened. Finally, when Barba stated, "That's why you want to explain all of that to us so we can talk right, and we can understand each other, because right now, we don't know..." defendant responded, "Well, yes." Defendant then again launched into his version of events.

Although it might have been the better practice for Barba expressly to ascertain defendant understood each of his rights and to persist until he got defendant to answer the precise question whether he wanted to talk to the detectives without a lawyer present, we conclude, from the totality of the circumstances, that defendant understood his rights. We further conclude he impliedly waived those rights, and that his waiver thereof was voluntary, knowing, and intelligent. Accordingly, defendant's statement to detectives was properly admitted against him at trial.[19]

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19 The recent case of *Sessoms v. Runnels* (9th Cir. Aug. 16, 2012, No. 08-17790) ___ F.3d ___ [2012 U.S.App. Lexis 17206] does not alter our conclusion. In that case, the defendant, at the outset of interrogation and before he had been read his rights, said, "There wouldn't be any possible way that I could have a—a lawyer present while we do this? [¶] … [¶] … Yeah, that's what my dad asked me to ask you guys … uh, give me a lawyer." (*Id*. at pp. *4-*5.) Instead of ending the interrogation, the police officers persuaded the defendant that having a lawyer was a bad idea and invoking his right to counsel would be futile because the police already knew what happened. Only then did they read defendant his rights, whereupon he agreed to talk. (*Id*. at pp. *5-*6.) The Court of Appeals reiterated that *Davis* only applies after a knowing and voluntary waiver of *Miranda* rights; when there has been no such waiver, "'[i]nvocation of the *Miranda* right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney,"' [citations], but the assertion need not be 'unambiguous or unequivocal,' [citation]." (*Sessoms v. Runnels*, *supra*, at pp. *34-*35.) This is so because "[a] person not aware of his rights cannot be expected to clearly invoke them. Once, however, a suspect has been read his *Miranda* rights, it is reasonable to ascribe to him knowledge of those rights." (*Id*. at pp. *21-*22.) Here, unlike in *Sessoms v. Runnels*, defendant had been read his rights before he said anything about a lawyer, a "critical factual distinction …." (*Id*. at p. *20.)

Moreover, were we to find the statement taken in violation of *Miranda*, we would nevertheless conclude its admission was harmless beyond a reasonable doubt. (See *People v. Davis* (2009) 46 Cal.4th 539, 598.) Defendant testified at trial. Because his statement was clearly not involuntary (see *People v. Jablonski* (2006) 37 Cal.4th 774,

II

JURY INSTRUCTIONS

Defendant contends the trial court's erroneous failure to instruct on all theories of manslaughter applicable to counts 1 and 2 requires reversal of his convictions. We disagree.

A. Background

With respect to the homicide charges, jurors were instructed on justifiable homicide based on self-defense. As to both William (count 1) and Clara (count 2), they were instructed on first and second degree murder, express and implied malice, and premeditation and deliberation. Jurors were also instructed that provocation could reduce murder from first degree to second degree, and to manslaughter. They were told that if they concluded defendant was provoked, they should consider the provocation in deciding whether the crime was first or second degree murder, and in deciding whether defendant committed murder or manslaughter.

With respect to William, jurors were additionally instructed on voluntary manslaughter based on sudden quarrel or heat of passion, and on imperfect self-defense.

813-814), it was admissible for impeachment to the extent his trial testimony was inconsistent (*People v. Storm* (2002) 28 Cal.4th 1007, 1038, fn. 14). Defendant says his statement was "undoubtedly" the basis for the jury's finding of premeditation with respect to William's killing, because defendant told detectives he stabbed William once, then left for 20 or 30 minutes before returning and stabbing him again. Defendant also says the prosecution used his statement and the fact he admitted falsely saying he had been kidnapped, to obtain instructions on consciousness of guilt, and to argue defendant's testimony and defense should not be believed. In his trial testimony, however, defendant admitted struggling with William and possibly injuring him, then leaving and returning. In addition, witnesses other than the detectives testified concerning statements defendant made to them about being kidnapped.

Jurors were further instructed, again as to William, on involuntary manslaughter based on simple battery.[20]

Defendant now contends the trial court should have instructed, as to count 1, on the lesser included offense of voluntary manslaughter based on an unintentional killing without malice committed during the course of an inherently dangerous assaultive felony. As to count 2, he says, the trial court should have instructed on the lesser included offenses of voluntary and involuntary manslaughter.

B. Analysis

The California Supreme Court recently summarized the applicable rules:

> "'The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.' [Citations.] 'That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser.' [Citations.] 'To justify a lesser included offense instruction, the evidence supporting the instruction must be substantial — that is, it must be evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist.' [Citations.]
>
> """Conversely, even on request, the court 'has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction.'" [Citation.] This substantial evidence requirement is not satisfied by "'*any* evidence … no matter how weak,'" but rather by evidence from which a jury composed of reasonable persons could conclude "that the lesser offense, but not the greater, was committed." [Citation.] "On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense." [Citation.]' [Citation.]" (*People v. Souza* (2012) 54 Cal.4th 90, 115-116; see also

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20 The jury instruction conference was not reported. After defendant testified, however, the trial court determined it was required to give, over the prosecution's objection, an involuntary manslaughter instruction with regard to William's death. Although the court's instruction to jurors concerning the various verdict forms mistakenly suggested the lesser included offenses applied to both homicide counts, the prosecutor clarified they only applied to count 1.

People v. DePriest (2007) 42 Cal.4th 1, 50; *People v. Cook* (2006) 39 Cal.4th 566, 596; *People v. Breverman* (1998) 19 Cal.4th 142, 154, 162.)

"[T]he sua sponte duty to instruct on lesser included offenses … arises even against the defendant's wishes, and regardless of the trial theories or tactics the defendant has actually pursued. Hence, substantial evidence to support instructions on a lesser included offense may exist even in the face of inconsistencies presented by the defense itself." (*People v. Breverman, supra,* 19 Cal.4th at pp. 162-163, fn. omitted.) As a result, "*every* lesser included offense, or theory thereof, which is supported by the evidence must be presented to the jury." (*Id*. at p. 155; accord, *People v. Thomas* (2012) 53 Cal.4th 771, 813.)

The testimony of a single witness, including the defendant, can constitute substantial evidence for this purpose. (*People v. Lewis* (2001) 25 Cal.4th 610, 646.) In deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses (*People v. Breverman, supra,* 19 Cal.4th at p. 162), and doubts as to the evidence's sufficiency should be resolved in favor of the accused (*People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12, superseded by statute on another point as stated in *In re Christian S.* (1994) 7 Cal.4th 768, 777). Mere speculation, however, "is an insufficient basis upon which to require the trial court to give an instruction on a lesser included offense." (*People v. Wilson* (1992) 3 Cal.4th 926, 942.)

It has been said that "[w]here a defendant 'denies any complicity in the crime charged, and thus lays no foundation for any verdict intermediate between "not guilty" and "guilty as charged" … [¶] … it is error to so instruct [on the lesser offense] because to do so would violate the fundamental rule that instructions must be pertinent to the evidence in the case at bar.' [Citation.]" (*People v. Trimble* (1993) 16 Cal.App.4th 1255, 1260.) Because jurors "are not required to make a binary choice between the prosecution evidence and the defense evidence," however, "if the evidence as a whole would support

a third scenario, the trial court may be required to give instructions on that scenario. [Citation.]" (*People v. Hernandez* (2003) 111 Cal.App.4th 582, 589-590; see *People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1016-1017 [examining whether defendant was entitled to instructions on voluntary manslaughter based on circumstantial evidence, even though defendant denied shooting victim or even being armed].) Nevertheless, an instruction on a lesser included offense is not required "if the evidence was such that the defendant, if guilty at all, was guilty of the greater offense. [Citations.]" (*People v. Kelly* (1990) 51 Cal.3d 931, 959.)

Murder is an unlawful killing committed with malice aforethought. (§ 187, subd. (a).) Malice may be either express or implied. (*People v. Taylor* (2010) 48 Cal.4th 574, 623.) Express malice is an intent to kill. (§ 188; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.) "Malice will be implied 'when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life. [Citations.]' [Citations.]" (*People v. Taylor, supra,* 48 Cal.4th at pp. 623-624.) "Second degree murder is the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307, overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172, 1199.)

"The lesser included offense of manslaughter does not include the element of malice, which distinguishes it from the greater offense of murder. [Citation.]" (*People v. Cook, supra,* 39 Cal.4th at p. 596.) Both voluntary and involuntary manslaughter are lesser included offenses of murder (*People v. Thomas, supra,* 53 Cal.4th at p. 813; *People v. Lewis, supra,* 25 Cal.4th at p. 645), although involuntary manslaughter has been held not to be a lesser included offense of voluntary manslaughter (*People v. Orr* (1994) 22 Cal.App.4th 780, 784).

Malice is presumptively absent, and the crime constitutes voluntary manslaughter, when a defendant, acting with intent to kill or conscious disregard for life, "kills 'upon a sudden quarrel or heat of passion' (§ 192, subd. (a)), provided that provocation is sufficient to cause an ordinarily reasonable person to act rashly and without deliberation, and from passion rather than judgment. [Citation.] Additionally, when a defendant kills in the actual but unreasonable belief that he or she is in imminent danger of death or great bodily injury, the doctrine of 'imperfect self-defense' applies to reduce the killing from murder to voluntary manslaughter. [Citations.]" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1086; see also *People v. Blacksher* (2011) 52 Cal.4th 769, 832-833; *People v. Lasko* (2000) 23 Cal.4th 101, 108-110; *People v. Blakeley* (2000) 23 Cal.4th 82, 88-89.)

In *People v. Garcia* (2008) 162 Cal.App.4th 18 (*Garcia*), the appellate court held that an unlawful killing during the commission of an inherently dangerous felony, even if unintentional, constitutes voluntary manslaughter where the underlying felony is an aggravated assault. (*Id*. at pp. 22, 29.) The court observed that if the underlying felony is inherently dangerous, the defendant can usually be found guilty of second degree murder under the felony-murder doctrine. (*Id*. at p. 28.) "When … the only underlying, inherently dangerous felony committed by the defendant is an aggravated assault, however, the felony-murder rule does not apply under the merger doctrine" set out in *People v. Ireland* (1969) 70 Cal.2d 522, 539 (*Ireland*). (*Garcia*, *supra*, at p. 29.)[21]

"Involuntary manslaughter is manslaughter during 'the commission of an unlawful act, not amounting to a felony,' or during 'the commission of a lawful act which might

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21 *Garcia* was decided before *People v. Chun*, *supra*, 45 Cal.4th 1172, and as a result, its reliance on some of *Ireland*'s progeny is now questionable. (*Garcia, supra*, 162 Cal.App.4th at p. 29; see *People v. Chun, supra,* 45 Cal.4th at pp. 1199-1201.) Whether voluntary manslaughter may be premised on a killing without malice that occurs during commission of an inherently dangerous assaultive felony is an issue presently pending before the California Supreme Court. (*People v. Bryant* (2011) 198 Cal.App.4th 134, review granted Nov. 16, 2011, S196365.)

produce death, in an unlawful manner, or without due caution and circumspection.' (§ 192, subd. (b).) 'The offense of involuntary manslaughter requires proof that a human being was killed and that the killing was unlawful. [Citation.] A killing is "unlawful" if it occurs (1) during the commission of a misdemeanor inherently dangerous to human life, or (2) in the commission of an act ordinarily lawful but which involves a high risk of death or bodily harm, and which is done "without due caution or circumspection."' [Citation.]" (*People v. Murray* (2008) 167 Cal.App.4th 1133, 1140.) There also exists a nonstatutory form of the offense, which is based on the predicate act of a noninherently dangerous felony committed without due caution and circumspection. (*People v. Butler* (2010) 187 Cal.App.4th 998, 1007.) "[C]riminal negligence is the governing mens rea standard for all three forms of committing the offense. [Citations.]" (*Ibid.*)[22]

Defendant contends the trial court should have instructed on the *Garcia* theory of voluntary manslaughter with respect to count 1. He points out that in his videotaped statement, he demonstrated how William was stabbed when defendant pushed William's own hand, which was holding the knife, toward William. Defendant says this act was "arguably an assault with a deadly weapon, an inherently dangerous felony, which resulted in an unintended killing."

In our view, the record contains no evidence from which a reasonable juror could conclude the offense committed against William was merely an assault with a deadly weapon rather than an intentional killing. Defendant appears to focus on his initial encounter with William. But by his own admission, defendant left the house and then

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[22] The version of CALCRIM No. 580 in effect at the time of defendant's trial was worded in such a way that the trial court had the option of omitting any reference to criminal negligence. The instruction has since been revised to include criminal negligence as an element of the offense. Although defendant notes the trial court's omission of criminal negligence in the instruction given to his jury, he does not predicate a claim of error thereon.

returned and had a second altercation with William. William was stabbed at least three times in vital areas of the chest, and at least once between the shoulder blades. Defendant fails to explain how a jury could have concluded the stab wounds resulted from a mere assault — even one with a deadly weapon — especially in light of the fact jurors rejected defendant's version of events when they found him guilty of first degree murder, which necessarily involved a killing that was intentional, deliberate, and premeditated, rather than voluntary manslaughter based on heat of passion or imperfect self-defense.

With respect to count 2, the evidence shows defendant either intentionally killed Clara (who was stabbed at least once at the base of the neck and twice in the back) or he was not her killer. (See *People v. Manriquez* (2005) 37 Cal.4th 547, 588 [even if first shot simply discharged when defendant pushed victim, killing could only be characterized as intentional where defendant thereafter intentionally kept firing his weapon, including at least one other fatal wound].) Thus, there was no basis upon which to predicate a finding of any form of manslaughter as a lesser included offense.

Defendant says there was evidence William had the knife and stabbed Clara when defendant attempted to break up the couple's fight. We fail to see how William stabbing Clara could impose criminal liability on defendant under the circumstances shown here.[23] Assuming jurors could have found defendant committed simple battery on Clara when attempting to get her and William to stop arguing, there is no evidence it factored into her death. (See *People v. Butler, supra*, 187 Cal.App.4th at pp. 1009-1010 [involuntary manslaughter, like other forms of homicide, requires a showing defendant's conduct proximately caused victim's death, which, when there are concurrent causes, means defendant's conduct must have been substantial factor contributing to result; in addition,

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23 For instance, there was no evidence defendant pushed Clara onto the knife or prevented her from defending herself against William.

proximate causation requires death to have been reasonably foreseeable, natural and probable consequence of defendant's act].)

Defendant told his relatives he hit or pushed Clara in order to escape. At trial, however, he explained he said this because he had to have some excuse. Under the circumstances, defendant's statement does not constitute substantial evidence from which reasonable jurors could conclude he was not guilty of murder, but guilty of manslaughter. This is especially so since defendant never placed the knife in his own hand until Clara had already been fatally stabbed.

Defendant seems to suggest jurors could have found imperfect self-defense or heat of passion with respect to Clara. Although, under the doctrine of transferred intent, self-defense may apply where the defendant intends to injure or kill the person posing the threat but instead inadvertently kills an innocent bystander (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1357), jurors rejected these theories with respect to William. There is simply no evidence from which to conclude defendant acted in imperfect self-defense or out of heat of passion with respect to Clara but not William, or that he otherwise acted without malice as far as she — but not William — was concerned. We might speculate some such scenario occurred, but speculation is not a sufficient basis for jury instructions on lesser included offenses.

In light of the evidence presented at trial, we conclude the trial court did not err in failing to instruct on the *Garcia* theory of voluntary manslaughter as to count 1, or failing to instruct on any lesser offense as to count 2.[24]

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[24] Even if we were to assume, for sake of discussion, that error occurred, we would find it harmless. The jury's verdicts make it clear it is simply not reasonably probable defendant would have obtained a more favorable outcome had additional instructions on lesser included offenses been given. (*People v. Breverman, supra,* 19 Cal.4th at p. 178; see, e.g., *People v. Cook, supra,* 39 Cal.4th at p. 597; *People v. Manriquez, supra,* 37 Cal.4th at p. 588.)

DISPOSITION

The judgment is affirmed.

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DETJEN, J.

WE CONCUR:

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CORNELL, Acting P.J.

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KANE, J.